

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

United States of America,

Case No. 3:18 CR 286

Plaintiff,

ORDER GRANTING  
MOTION TO SUPPRESS

-vs-

JUDGE JACK ZOUHARY

Antonio D. Boone,

Defendant.

**INTRODUCTION**

Defendant Antonio Boone is charged with being a felon in possession of a firearm (Doc. 1). Boone moved to suppress evidence (Doc. 19), arguing that officers who pulled him over and found a gun in his car did not have probable cause for the traffic stop. The Government responded (Doc. 20). On October 11, 2018, this Court held an evidentiary hearing (Docs. 24, 26). At that hearing, Toledo Police Officer Steven Loehrke testified and video from the police dash cam was played. The dash cam, however, was not activated until after the alleged traffic violation (*see* Doc. 26 at 2, 22), so the probable cause question turns on Loehrke's testimony. The parties filed Post-Hearing Briefs (Docs. 27–29).

**BACKGROUND**

Around 9:00 PM on April 26, 2018, Officers Steven Loehrke and Gavin Paszczykowski pulled over a red Chrysler Pacifica driven by Boone (Doc. 26 at 4). Just before the stop, both cars

were waiting to turn left, from northbound City Park onto westbound Nebraska Avenue (*id.* at 4–5). Boone was first in line, another car was second, and the police cruiser was third (*id.*). The intersection is a four-way intersection with a traffic light. City Park has only one lane in each direction.

Loehrke saw Boone make the left turn. Then he noticed a car traveling southbound on City Park -- towards the officers -- and saw this car slow down in response to Boone’s turn (*id.*). The officers took time to get behind Boone, activated their lights, and initiated a traffic stop (*id.* at 5–6). When Loehrke approached Boone’s driver window, the following conversation took place (Doc. 20 at 2):

Loehrke:	You know why I stopped you?
Boone:	No.
Loehrke:	When you were turning in front of that car, the car had to slow down, when you were turning left.
Boone:	Oh, when I was [inaudible].

The officers ran Boone’s information and found he had outstanding warrants and a suspended license (Doc. 26 at 7). When the officers arrested Boone, they found a gun in his car (*id.* at 8). Loehrke cited Boone for driving on a suspended license and failing to yield the right-of-way when turning left (Doc. 20-5). The Toledo Municipal Court dismissed the right-of-way charge without ruling on the merits (Doc. 20-3).

## DISCUSSION

### *Probable Cause*

When Loehrke and his partner pulled Boone over, the officers were required to have “probable cause to believe that a traffic violation . . . occurred.” *Whren v. United States*, 517 U.S. 806, 810 (1996). Whether the officers had probable cause to pull Boone over depends upon whether, at that moment, “the facts and circumstances within their knowledge and of which they had reasonably

trustworthy information were sufficient to warrant a prudent man in believing that [Boone] had committed or was committing an offense.” *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964).

Here, the information about the traffic violation comes from Loehrke’s testimony, so the trustworthiness of that information depends entirely upon his credibility. For the stop to have been lawful, it must have been “objectively reasonable” for Loehrke to believe that Boone violated Ohio’s right-of-way statute. *United States v. Gross*, 550 F.3d 578, 584 (6th Cir. 2008)

### ***Immediate Hazard***

Ohio Revised Code Section 4511.42(A), titled “Right of way rule when turning left,” provides:

The operator of a vehicle . . . intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle . . . approaching from the opposite direction, whenever the approaching vehicle . . . is within the intersection or so close to the intersection . . . as to constitute an immediate hazard.

In other words, a driver turning left at an intersection violates Section 4511.42(A) when either: (1) an approaching vehicle is within the intersection; or (2) an approaching vehicle is “so close to the intersection . . . as to constitute an immediate hazard.” Here, the approaching vehicle was not within the intersection (Doc. 26 at 22). Whether Boone violated this statute, therefore, turns on whether the other vehicle was so close as to constitute an “immediate hazard.” Ohio Rev. Code § 4511.42(A).

“There is no precise or absolute measurement to determine whether an approaching vehicle constitutes an immediate hazard.” *City of Akron v. Charley*, 2 Ohio Misc. 2d 1, \*2 (Akron Mun. Ct. 1982). Numerous Ohio state cases discuss Section 4511.42(A). *See* Doc. 27 at 6 (citing cases). The cases of *State v. Alford*, 2013 WL 6054485 (Ohio Ct. App. 2013), and *State v. Cox*, 1994 WL 21882 (Ohio Ct. App. 1994), are two examples in which right-of-way citations were upheld where, as here, the oncoming driver took no evasive action other than applying the brakes. The common thread

between these cases seems to be that an immediate hazard exists when the oncoming driver must apply the brakes to avoid an imminent collision with the turning car.

***Officer Loehrke's "Visual Estimation of the Speed"***

Regardless of how this Court chooses to articulate what constitutes an immediate hazard, “[t]he question is not whether [Boone] was *actually* violating the Ohio Traffic Code” when he made the left turn; “rather, it is whether [Loehrke] *reasonably believed* that [Boone] was violating the Ohio Traffic Code.” *United States v. Gaskin*, 587 F. App’x 290, 295 (6th Cir. 2014) (emphasis in original). *See also United States v. Chanthasouvat*, 342 F.3d 1271, 1276 (11th Cir. 2003) (“A traffic stop based on an officer’s incorrect but reasonable assessment of facts does not violate the Fourth Amendment.”). The Government alleges Loehrke’s conclusion that the oncoming car “had to slow down to avoid hitting the Chrysler” was an objectively reasonable belief (Doc. 26 at 5).

But not only is it unclear whether the oncoming car had to slow down to avoid a collision, it is unclear how Loehrke knew the oncoming car slowed down at all. Throughout the hearing, Loehrke repeated one vague line of explanation: his conclusion was based upon “a visual estimation of the speed” of the oncoming vehicle (*see id.* at 15, 20). Loehrke gave no specific facts to support his conclusion. He did not hear tires screech, horns honk, or brakes squeal (*see id.* at 19). He did not see the oncoming car “nose down,” as officers did under similar circumstances in *Alford*, 2013-Ohio-5045, at \*1. He did not see the oncoming car swerve or take other evasive action, as the officers did in *State v. Baugnet*, 2005 WL 388163, at \*1 (Ohio Ct. App. 2005). He did not see brake lights illuminate (and in fact could not have seen them from his straight-on angle) (*see* Doc 26 at 19–20). There is only his “visual estimation of the speed” (*id.* at 15, 20).

This visual estimation is suspect for several reasons. First, Loehrke contradicted himself about what he saw before and after the turn. At first, he said he did not notice the oncoming car until

after Boone had already completed his turn (*id.* at 13–14). After Boone turned, “that’s the first time that [he] noticed the vehicle” (*id.* at 13). “Prior to Mr. Boone’s turn,” Loehrke “may have seen the vehicle, but [he] didn’t register [it]” (*id.* at 14). Yet later in the hearing, Loehrke said, “It appeared that the vehicle was traveling at a higher rate of speed before Mr. Boone’s turn. And in the midst of Mr. Boone’s turn, the vehicle appeared to have slowed” (*id.* at 20).

Second, Loehrke contradicted himself about what he knew of the speed of the oncoming car. Earlier in the hearing, defense counsel asked Loehrke, “Do you know how fast [the oncoming car] was going?” (*id.* at 13). Loehrke responded, “No.” (*id.*). But later in the hearing, Loehrke offered that before Boone made his left turn, the oncoming car was going “around 35 [mph]” (*id.* at 15). Loehrke said that, after Boone made his turn, the car was going “less than 35 [mph],” but he did not say how much less (*id.*). And, when asked, “How do you know that?” Loehrke repeated, “Like I said, a visual estimation of the vehicle speed” (*id.*).

Third, the time of day and angle of Loehrke’s view of the oncoming car made it difficult to make an objectively reasonable estimation of speed. The turn at the intersection took place around 9:00 PM. “[I]t was dusk” and “the headlights were on all vehicles” (*id.* at 13). The road was two lanes -- one in each direction (*id.* at 14–15). Loehrke was seated “in the driver’s seat . . . on the left side of [his] vehicle” (*id.* at 14). He was two or three car lengths away from the intersection at the time of the turn (*id.* at 17), and the oncoming car was far enough away that it did not enter the intersection until after Boone had completed his turn (*id.* at 22). Loehrke’s only view of the oncoming car, therefore, was looking almost directly into the headlights of that car (*id.* at 14). He did not remember the make, model, or color of the oncoming car; he gave no foundation for his estimate of its speed (*id.* at 13).

Finally, Loehrke had several chances during the hearing to add specific facts to support his conclusion, but it was clear he had nothing else to offer. For instance, when asked, “What about the oncoming traffic led you to conclude that the oncoming traffic had to slow down to avoid a collision?” Loehrke responded, “I can’t say . . . . It was just apparent to me.” (*id.* at 6).

#### CONCLUSION

Given that probable cause must be based upon trustworthy information and objectively reasonable conclusions, this Court finds the Government has not met its burden of proof and the Motion to Suppress (Doc. 19) is granted.

IT IS SO ORDERED.

s/ Jack Zouhary  
JACK ZOUHARY  
U. S. DISTRICT JUDGE

December 18, 2018